

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL GODZAC

CASE NO. 03-64583

Debtor

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Presently under consideration by the Court is a motion filed by the chapter 13 trustee, Mark W. Swimelar, Esq. ("Trustee"), dated October 6, 2003, seeking dismissal of the case of Michael A. Godzac ("Debtor M. Godzac") pursuant to § 1307(c) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Debtor M. Godzac filed opposition to the motion on October 16, 2003. On October 17, 2003, an affidavit in support of the Trustee's motion was filed on behalf of Blase Industries Corporation, d/b/a Wilson Solutions ("Wilson Solutions").

The motion was heard on October 21, 2003, at the Court's regular motion term in Syracuse, New York. The Court adjourned the Trustee's motion to November 18, 2003, based on representations by Debtor M. Godzac's counsel that there was a motion scheduled to be heard on November 4, 2003, seeking to sever Debtor M. Godzac from a previously filed joint chapter 7 case and have his case dismissed. The argument was that if Debtor M. Godzac's dismissal motion was granted, the basis for the Trustee's motion to dismiss the chapter 13 case would be rendered moot. At the hearing on November 18, 2003, the Trustee, as well as Wilson Solutions, asserted that despite the fact that Debtor M. Godzac no longer had two cases pending simultaneously,¹ the chapter 13 case should be dismissed based on a lack of good faith in filing the petition. Accordingly, the Court adjourned the Trustee's motion to December 16, 2003, for further oral argument on this aspect of the motion. Following argument by the parties, the Court reserved its decision on the motion, requesting that both Debtor M. Godzac's and Wilson Solutions' attorneys submit affidavits concerning activities in the case postpetition which the Court would consider in making its determination. The matter was submitted for decision on December 29, 2003.

JURISDICTIONAL STATEMENT

¹ The Trustee's motion set forth two grounds for dismissal of Debtor M. Godzac's chapter 13 case. The first was based on the fact that Debtor M. Godzac had two bankruptcy cases pending simultaneously. The second was based on the assertion that it was a one creditor case and, based on the holding in *In re Scotten*, 281 B.R. 147 (Bankr. D. Mass. 2002), should be dismissed on bad faith grounds.

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS

On May 29, 1996, the Debtor M. Godzac and his wife, Terry Lynn Godzac (“Debtor T. Godzac”)(“collectively the Debtors”), filed a voluntary petition pursuant to chapter 13 of the Code. The Debtors’ plan was confirmed on October 23, 1996. Beginning in August 1999, the Trustee filed several motions to dismiss the initial chapter 13 case as a result of defaults in compliance with the terms of the order of confirmation. On May 19, 2000, the Court signed an order conditionally dismissing the case unless Debtor M. Godzac and Debtor T. Godzac earlier converted their case to chapter 7. On May 30, 2000, some four years after filing their chapter 13 petition, the Debtors filed a notice voluntarily converting their case to chapter 7. The Court signed an order on June 5, 2000, granting the Debtors’ motion and converting the case.

On September 12, 2000, Wilson Solutions filed a complaint in the converted case seeking a determination of nondischargeability of a debt owed to it (Adv. Pro. 00-80186). On March 26, 2002, the Court granted a judgment in the adversary proceeding in favor of Wilson Solutions in the nondischargeable amount of \$94,870.52 after having stricken both Debtors’ answer as a sanction for their failure to comply with a prior Order of the Court dated November 26, 2001, compelling both Debtors to serve responses to outstanding document demands and to submit to a deposition requested by Wilson Solutions. On June 9, 2003, both Debtors filed a motion seeking to enjoin Wilson Solutions from pursuing collection of the judgment until an adversary

proceeding commenced by both Debtors on June 4, 2003, seeking a determination as to the validity and extent of Wilson Solutions's judicial lien, could be adjudicated (Adv. Pro. 03-80283). The Court denied that motion in an Order dated June 24, 2003, in part due to the fact that both Debtors had delayed almost 14 months post judgment in filing the adversary proceeding and the motion.²

By letter dated June 23, 2003, Wilson Solutions's attorneys agreed to delay the execution of an arrest warrant against Debtor T. Godzac and a motion for contempt filed against Debtor M. Godzac in New York State Supreme Court "on the condition that both of your clients [the Debtors] fully complete the information subpoenas and fax them promptly to my attention on or before Friday, June 27, 2003." *See* Exhibit A of Supplemental Affirmation of Mark P. Malak, Esq., attorney for Wilson Solutions, dated December 23, 2003 ("Malak Affirmation").

The information requested in the subpoenas was not provided by the Debtors by June 27, 2003. *Id.* at ¶ 7. Instead, Debtor M. Godzac filed the instant petition pursuant to chapter 13 of the Code on July 3, 2003. In a letter from Debtor M. Godzac's counsel, dated July 3, 2003, he indicated to Malak that, despite the filing, it was his intention to comply with the information requested in the information subpoenas. *Id.* at Exhibit B. However, he also indicated that he did not intend "to pay the contempt fine at this time, against Debtor T. Godzac, as the Co-Debtor Stay is now in effect under the new Chapter 13 filing." *Id.*

On October 24, 2003, the Debtors filed a motion requesting that the Debtors' pending

² The Court, at a hearing held on June 17, 2003, indicated that it would treat both Debtors' motion as one seeking reconsideration of the prior nondischargeable judgment.

chapter 7 case be severed.³ The motion was heard on November 4, 2003, and orally granted by the Court despite opposition by Wilson Solutions. A proposed written order severing the joint chapter 7 case of Debtor M. Godzac and Debtor T. Godzac was not submitted for signature to the Court by the Debtors, however, until January 16, 2004. Said proposed order severing, signed on January 26, 2004, was later vacated due to a procedural defect and another proposed order was received from the Debtors on January 21, 2004, which the Court signed the same day. Pursuant to that Order Debtor M. Godzac was severed from Case No. 96-62606 leaving the active chapter 7 in the name of Debtor T. Godzac. Debtor M. Godzac was assigned a new chapter 7 case number (04-60401). By Order, dated January 29, 2004, Debtor M. Godzac's chapter 7 case was dismissed.

In his chapter 13 petition, Debtor M. Godzac identifies only two creditors. Washington Mutual is listed as a secured creditor with a claim of \$49,000 based on a mortgage on his residence. Wilson Solutions is listed as the only unsecured creditor. According to Debtor M. Godzac's plan, filed with his petition, Washington Mutual is to receive monthly payments of \$925 directly from him. The plan also provides for payments of \$442 per month over 36 months to the Trustee, thereby creating a dividend of 13% to unsecured creditors.

By Notice of Deposition, dated November 7, 2003, Wilson Solutions sought to depose both Debtors on December 12, 2003, and also requested financial document disclosure. *See*

³ On October 20, 2003, both Debtors filed a motion in their adversary proceeding (Adv. Pro. 03-80283) seeking to sever the chapter 7 case of Debtor M. Godzac and to withdraw his causes of action from the complaint and to close his chapter 7 case. According to the docket of the adversary proceeding, an amended motion was refiled in the main case on October 24, 2003, which merely states the intention to file a motion to amend the complaint to remove any causes of action pertaining to Debtor M. Godzac specifically. No such motion, however, appears on the docket in Adversary Proceeding 03-80283.

Malak Affirmation at Exhibit C. Although Debtors' counsel promised to make the records available, as of December 23, 2003, none had been provided to Wilson Solutions' attorneys. *Id.* at ¶ 10 and letter, dated December 11, 2003, from Debtors' counsel to Malak. Nor did either of the Debtors appear for the deposition on December 12, 2003.⁴

The Trustee's motion, currently under consideration by the Court, seeks dismissal of the Debtor M. Godzac's chapter 13 case (Case No. 03-64583) on the basis that he filed his most recent chapter 13 petition in bad faith.

DISCUSSION

Courts have held that a lack of good faith constitutes sufficient "cause" to dismiss a chapter 13 petition pursuant to Code § 1307(c). *See Matter of Love*, 957 F.2d 1350, 1354 (7th Cir. 1992); *In re Herndon*, 218 B.R. 821, 823-34 (Bankr. E.D. Va. 1998) (citations omitted). This requires an examination of the totality of circumstances surrounding Debtor M. Godzac's chapter 13 filing with the focus on whether it was "fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." *In re Klevorn*, 181 B.R. 8, 11 (Bankr. N.D.N.Y. 1995), quoting *Matter of Love*, 957 F.2d at 1357. To this end, courts have examined a number of factors including:

⁴ In the letter, dated December 11, 2003, Debtor M. Godzac's counsel indicated that the Debtor would be unable to appear at the deposition because of his mother's and daughter's illnesses. According to Debtor M. Godzac, his mother passed away on December 13, 2003. *See* Affidavit of Michael Godzac, sworn to December 24, 2003, at ¶ 4. In the Affidavit, Debtor M. Godzac requests additional time to provide the requested documentation and to reschedule the depositions. He also takes exception to the fact that Wilson Solutions was seeking to depose his wife "despite the fact that she is not responsible for any debt purportedly owed to them." *Id.* at ¶ 9.

the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

Matter of Love, 957 F.2d at 1357.

Wilson Solutions relies on the case of *In re Scotten*, 281 B.R. 147 (Bankr. D. Mass. 2002) in support of its motion. *Scotten* addressed an objection to confirmation of a debtor's chapter 13 plan on the basis of bad faith filing of both the petition and the plan. The debt, totaling in excess of \$300,000, arose as a result of a judgment obtained in a civil action based on the debtor's statutory rape of a individual under the age of 14, for which the debtor served five years in prison. *Id.* at 148. In addition to the objecting creditor, there were only two other unsecured creditors in the case which were owed a total of \$19,846.60 in credit card debt. *Id.*

The court in *Scotten* examined both the pre- and postpetition conduct of the debtor in examining "good faith" and concluded that "[t]he facts and circumstances of this case dictate a finding that the Chapter 13 petition and plan were not filed in 'good faith.'" *Id.* at 149. One of the factors it examined was the type of debt sought to be discharged and whether it would have been nondischargeable in a chapter 7. *Id.* The court noted that when a debtor is seeking a "superdischarge," his/her burden is particularly heavy "in overcoming an objection to confirmation based on 'good faith.'" The court was particularly disturbed by the 10% dividend proposed to be paid to the objecting creditor, finding it an "extremely small dividend in comparison to her injuries." *Id.* at 150.

The court in *Scotten* noted that no payments had been made on the prepetition judgment and that the debtor's sole motivation for filing was to avoid having to pay the judgment. *Id.* The

court cited to other courts which had dismissed cases finding that such a motivation was adequate grounds for dismissal based on “bad faith.” *Id.* The court noted that the “[b]ottom line is whether the debtor is attempting to thwart his creditors, or is making an honest effort to repay them to the best of his ability.” *Id.*, quoting *In re Virden*, 279 B.R. 401, 409 (Bankr. D. Mass. 2002). The court in *Scotten* ultimately dismissed the bankruptcy case relying on the nominal dividend, the nondischargeability of the debt, the timing of the filing and the fact that the case was in substance a one creditor case. *Id.*

Debtor M. Godzac cites to *In re Lilley* in which the bankruptcy court came to an opposite conclusion. See *In re Lilley*, 181 B.R. 809 (Bankr. E.D. Pa.), *aff’d in part, rev’d in part*, 185 B.R. 489 (E.D. Pa. 1995), *rev’d* 91 F.3d 491 (3d Cir.), *on remand* 201 B.R. 725 (Bankr. E.D. Pa. 1996). In that case, the bankruptcy court was asked to deny confirmation of a debtor’s plan which proposed to pay its only creditor, the Internal Revenue Service (“IRS”), \$50 per month for 36 months on a debt of \$178,000. *Lilley*, 181 B.R. at 810. The court noted that the debtor was 66 years old, in poor health and disabled, collecting \$900 per month in Social Security benefits. *Id.* The debtor had previously filed a chapter 7 petition in which his obligation to the IRS was found to be nondischargeable.⁵ Because of the debt limits in effect at the time of the debtor’s initial filing he was ineligible to file a chapter 13. Upon enactment of the 1994 amendments increasing those monetary limits, he filed a chapter 13. The bankruptcy court found that there was no good faith filing requirement in chapter 13 cases; however, it found that there was such a requirement with respect to confirmation of a chapter 13 plan. *Id.* at 811.

⁵ In its discussion, the court pointed out that the debtor had declined to pay income taxes following a situation in which the U.S. Secret Service had destroyed the debtor’s jewelry minting business by seizing all of the business’ assets “on the erroneous belief that the debtor’s business involved counterfeiting.” *Lilley*, 181 B.R. at 810-11.

The bankruptcy court in *Lilley*, declining to adopt the “totality of circumstances” test, concluded that the debtor was not guilty of any misconduct during the case and that there had been no fraudulent misrepresentations. *Id.* at 813-14. The bankruptcy court noted that “the practical effect of our decision on the parties before us in this case . . . is to allow the Debtor to retain his Social Security benefits of \$900 for the rest of his life.” *Id.* at 813. The debtor had no other assets, and the court pointed out that in the event he was lucky enough to obtain any in the future they would be subject to the lien of the IRS. The court denied the IRS’s objection to confirmation. *Id.* at 814.

On remand, the Hon. David A. Scholl, the former Chief Bankruptcy Judge for the Eastern District of Pennsylvania, noted that the Court of Appeals had “disapproved of this court’s holding in our original decision . . . that no good faith filing requirement exists in chapter 13 cases.” *Lilley*, 201 B.R. at 725. Judge Scholl, on remand, concluded that “the most important aspect of the [good faith] test is whether a debtor engages in fraudulent misrepresentations or serious nondisclosures of material facts in the Chapter 13 case in question” *Id.* at 726. He pointed out that the debtor in *Lilley* had been forthcoming in his disclosures and had demonstrated no misconduct in the case that would have demonstrated a lack of good faith. The court then concluded that the debtor’s case should not be dismissed, provided that his plan was extended to 60 months and the debtor agreed to grant relief from the automatic stay to the IRS to pursue his nondebtor wife. *Id.*

In *In re Keach*, 243 B.R. 851 (1st Cir. BAP 2000), the debtor had filed a chapter 13 petition while his chapter 7 case was pending and after he had received a discharge on all his debts, except for a debt of approximately \$180,000 owed to Claire Kuzniar, based on a prepetition judgment in state court. That debt had been determined to be nondischargeable

pursuant to Code § 523(a)(2). *Id.* at 853. *Id.* The debtor's unsecured debt at the time of filing was \$188,813. *Id.* He also owed the IRS \$28,596 in income taxes, which was a priority debt. *Id.* In his chapter 13 plan, the debtor proposed to make a lump sum payment of \$10,000 within three days after confirmation to the trustee as payment on the unsecured debt owed to Kuzniar, while the priority debt was to be paid in full over 60 months. *Id.* at 854. The bankruptcy court denied confirmation of the plan on the ground that the plan was not proposed in good faith. The Bankruptcy Appellate Panel for the First Circuit ("BAP") determined that the bankruptcy court, in finding a lack of good faith, had denied confirmation based on (1) the nondischargeability of the debt in chapter 7; (2) the 5% dividend being paid to unsecured creditors; and (3) the filing of successive chapter 7 and chapter 13 petitions. *Id.* at 855.

The BAP took exception to courts that interpreted "good faith" "to mean fairness to creditors as determined by the court." *Id.* at 867. The BAP took issue with courts that concerned themselves with the debtor's prefiling conduct, noting that Code § 1328 specifically allows a debtor a discharge even if the debts resulted from fraud. *Id.* at 868. The court found no problem in the debtor having filed the chapter 13 petition while the chapter 7 case was still pending. *Id.* at 870. It noted a change of circumstances, namely the fact that the objecting creditor had been about to have the sheriff sell the debtor's home and the finding that the debt was nondischargeable, which justified the filing of the chapter 13. *Id.* The fact that the debtor proposed to pay Kuzniar less than "what the bankruptcy judge thought they deserved on account of the Debtor's prefiling conduct" was not a basis for finding that the plan was filed in bad faith. *Id.* The fact that the debtor was also taking advantage of a superdischarge was not a basis for denying confirmation of the plan. The key consideration was whether the debtor was proposing to pay all his disposable income and whether the proposed plan met the best interests of creditors

test. *Id.* The court declined to hold “that an examination of the surrounding circumstances is inappropriate in determining whether a debtor has not met the good faith requirements of section 1325.” *Id.* at 871. However, the court cautioned that “courts must be very careful not to allow the freedom of such an examination to seduce them into a moralistic override of Congress’ determinations. A review of the surrounding circumstances should and must be limited to an examination of only those circumstances which are *relevant*.” *Id.* (emphasis in original).

As one court has noted, the majority of courts have rejected the *Lilley* and *Keach* approach insofar as the courts in each of those two cases found no relevancy to “nondischargeability of a particular debt under chapter 7, or other pre-petition behavior of the debtor bearing on his intent in proceeding under Chapter 13.” *In re McGovern*, 297 B.R. 650, 658 (S.D. Fla. 2003), citing *In re Sellers*, 285 B.R. 769 (Bankr. S.D. Ga. 2001). As the court in *McGovern* noted,

a Chapter 13 “good faith” analysis still properly entails examination of the type of underlying debt, the circumstances surrounding its creation; and any prepetition conduct of the debtor aimed at avoiding or thwarting the debt, especially as the factors may circumstantially reflect the debtor’s motivation, and ultimately his “good faith” in filing under Chapter 13.

Id. 297 B.R. at 658, citing *In re Cabral*, 285 B.R. 563 (1st Cir. BAP 2002); *In re Fleury*, 294 B.R. 1 (Bankr. D. Mass. 2003).

In *Sellers* the debtors had disposed of certain equipment in which the bank creditor held a security interest without the creditor’s consent. *Id.* 285 B.R. at 771. The debtors and the bank creditor had agreed to a consent order which provided that the debt to the creditor of approximately \$38,000 was nondischargeable pursuant to Code § 523(a)(6) in the debtors’ converted chapter 7 case. *Sellers*, 285 B.R. at 771. Approximately \$600,000 in unsecured debt

was discharged in the chapter 7 case. *Id.* However, the debtors made no efforts to satisfy the non-dischargeable debt. *Id.* The bank creditor obtained a judgment against the debtors and initiated an action to garnish the debtor's wages for purposes of collecting the debt. *Id.* In response, Mr. Sellers filed an individual chapter 13 petition in which he scheduled only two debts - that owed to the bank creditor and another in the amount of \$350 owed for medical services to the local fire department. *Id.* The debtor proposed to pay \$90 per month over 60 months or a total of \$5,400 to both unsecured creditors.

The court analyzed the debtor's situation, applying certain principles, which included:

1. Good faith may be called into question where a debtor seeks to discharge in Chapter 13 a debt nondischargeable in Chapter 7.
2. The good faith test requires more than a simple determination that a debtor is applying his "best effort" in designating all his disposable income to his proposed plan to discharge a debt dischargeable in Chapter 7.
3. Good faith requires a showing that reasons other than, or in addition to, a nondischargeable debt pressed debtor to file for Chapter 13 protection.
4. A Chapter 13 debtor must evidence, in the totality of circumstances, an overall sincere effort to satisfy a claim non-dischargeable in Chapter 7.

Id. at 773-774. Applying the above factors, the court in *Sellers* concluded that the debtor's case had not been filed in good faith and that the case should be dismissed. *Id.* at 775. As the court noted, "[g]ood faith is absent 'where all the facts lead inexorably to the conclusion that the petition has been filed to avoid, at minimal cost, a nondischargeable debt.'" *Id.* at 777, quoting *In re Meltzer*, 11 B.R. 624, 627 (Bankr. E.D.N.Y. 1981).

It is quite clear to this Court that the sole purpose for filing the current chapter 13 petition was to discharge the debt owed to Wilson Solutions when Debtor M. Godzac's efforts to have

the Court reconsider its nondischargeability judgment failed. What led to Debtor M. Godzac's filing his chapter 13 petition is most telling. The Court granted a nondischargeable judgment in favor of Wilson Solutions on March 26, 2002. No appeal was taken of the judgment. It was not until June 9, 2003, some fourteen months after the entry of the judgment, that the Debtors sought to enjoin Wilson Solutions from pursuing collection of the judgment on the basis that the Debtors had not had an opportunity to challenge the amount of Wilson Solutions's claim. Debtors' counsel was unable to explain the reason for the delay in seeking such relief. Furthermore, during the fourteen months, Debtors made no effort to make payment on the judgment debt. Nor have the Debtors cooperated with Wilson Solutions in its efforts to obtain information that would allow it to take the necessary steps to collect on the judgment, despite numerous promises by Debtors' counsel to provide the financial disclosure requested in the information subpoenas. This culminated in contempt proceedings in the state court against Debtor M. Godzac and the possible arrest of Debtor T. Godzac. As a result, Debtor M. Godzac felt compelled to file this chapter 13 petition on July 3, 2003, in an effort to further frustrate Wilson Solutions' collection efforts. This was done despite the fact that Debtor M. Godzac's chapter 7 case was still pending.

Debtor M. Godzac is now proposing to make payments of \$442 to the Trustee over 36 months for an estimated dividend to Wilson Solutions of 13%. The only other creditor listed by the Debtor M. Godzac in his petition is the mortgagee on his residence who is receiving payments directly from him outside the plan.

It is apparent to this Court that in filing his chapter 13 petition it was Debtor M. Godzac's intent "to achieve debt relief or debt avoidance - the purposes of Chapter 7 - rather than debt rehabilitation or debt payment - the purposes of Chapter 13." *McGovern*, 297 B.R. at 659 (noting that such intent "tends to evince a lack of the requisite good faith for obtaining Chapter

13 bankruptcy court protection”). Debtor M. Godzac’s failure to make payment on the nondischargeable debt and failure to comply with further discovery requests by Wilson Solutions in connection with its collection efforts, in the view of the Court, demonstrates a clear lack of good faith on the part of Debtor M. Godzac. Accordingly, based on the totality of circumstances, this Court concludes that Debtor M. Godzac’s current chapter 13 petition was filed in bad faith based on the nondischargeable nature of the debt, the continuing efforts to frustrate collection of the judgment based on that debt, the minimal dividend, the timing of the chapter 13 filing and the fact that the case is basically a one creditor case. It is clear that his sole motivation for filing was to avoid having to pay the nondischargeable judgment held by Wilson Solutions. Having proposed to make payments over 36 months, it does not appear that Debtor M. Godzac is making an honest effort to repay Wilson Solutions to the best of his ability. The Court’s conclusion comports with the basic purpose and spirit of chapter 13, which is “rehabilitation and repayment of debt by periodic payments . . . with the aim of providing honest, unfortunate and genuinely financially distressed debtors an opportunity to obtain a fresh start.” *Id.* at 658.

Based on the foregoing, it is hereby

ORDERED that the Trustee’s motion, joined in by Wilson Solutions, seeking dismissal of Debtor M. Godzac’s chapter 13 case pursuant to Code § 1307(c) is granted.

Dated at Utica, New York

this 23rd day of February 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge